

No. 83-1603

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In the Supreme Court of the United States

October Term, 1983

DONALD OTIS BURNWORTH.

Petitioner,

vs.

EULA DEL BURNWORTH.

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF COLORADO

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QUESTION PRESENTED

Whether this Court should grant a writ of certiorari to review an alleged denial of due process, where the Petitioner at trial had full and ample opportunity to present his case to the trial court?

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OPINIONS BELOW

The opinions below are correctly set forth in the Appendices to the Petition.

JURISDICTION

The jurisdiction of this Court rests upon the basis stated by Petitioner, to wit: 28 USC 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment Fourteen is correctly quoted by Petitioner.

STATEMENT OF THE CASE

A. Procedure

The procedural history of the case is correctly set forth by Petitioner on pages 3-4, of the Petition.

B. Facts

This dissolution proceeding was heard by a Referee pursuant to a Local Rule without objection by Petitioner.

During the course of the hearing before the Referee, for the convenience of the parties and the witnesses, many witnesses were called out of order. Thus a great deal of the Petitioner's (hereafter Donald) witnesses were heard by the Referee during the course of the Respondent's (hereafter Eula Del) case in chief. Hearings were held before the Referee on April 30, 1980 (TR. Vol. 1) which show that four witnesses were called by Donald, including one as to the value of certain real estate, and two witnesses were heard for Eula Del; on July 15, 1980 (TR. Vol. 3), during which three witnesses were called by Donald and five by Eula Del; on October 21, 1980 (TR. Vol. 5) during which Donald was called as an adverse witness by Eula Del, and Eula Del testified on her own behalf. Donald's counsel had an opportunity, which he chose not to use, to examine Donald at this hearing before Eula Del was called (TR. Vol. 5, p. 72); and on October 22, 1980 (TR. Vol. 6). On this last day, Eula Del completed her testimony and called five other witnesses; and Donald testified, called Eula Del as an adverse witness and also called three other witnesses.

TR. Vol. 2 was a short hearing, during which no witnesses were heard, which dealt with Temporary Orders. TR. Vol. 4 also involved a brief hearing, which was held before Judge Roan on Donald's request to lift a *lis pendens* which had been placed on the property at 6650 Quitman Court in

Arvada (hereinafter the Quitman property). None of the material contained in TR. Volumes 2 and 4 has any relevancy to this Petition.

On November 6, 1980 the Referee submitted his recommended order which was approved and made an Order of the District Court on that day. Thereafter, pursuant to Local Rule 38, Donald moved on February 17, 1981 to vacate and set aside the Order of November 6, 1980 (Vol. 1 p. 81).

On March 30, 1981, Judge Roan of the District Court heard oral argument on this Motion. This was recorded and made part of the Record in a Volume which bears that date, but is unnumbered. At this hearing, Donald raised the question of the value of the Quitman property at the time of the marriage, stating that the Referee, in setting the value at \$110,000.00 had set too low a figure thereon (p. 5) and, therefore, the increase in value during the marriage of this property was set too high (p. 8). There was also an objection made to the valuation of certain mountain property referred to as the Columbine Lake property (p. 10), and also to the inclusion of the same in the marital estate (p. 11). A similar objection was entered as to the inclusion of a Mercedes automobile in the marital estate (p. 12-13). Donald further objected to the division of the personalty (p. 13-14). With regard to procedure, Donald objected to the speed ordered by the Referee as to the proceedings on the last day of the evidentiary hearings (p. 14-15) and to the fact that he claimed the Referee was confused (p. 15). Nowhere at that time did Donald object to the application of Local Rule 38, *per se*.

On April 10, 1981, Judge Roan denied the Rule 38 request and again affirmed the recommended findings and order of the Referee, and gave the parties thirty (30) days in which to file Motions (Vol. 1, p. 89-90).

Since the issue raised by Donald depends upon the facts of record, those facts (and record references thereto) which support the decision below will be incorporated in the pertinent sections of the reasons for denying the writ.

REASONS FOR DENYING THE WRIT

Donald was given a full and fair opportunity to present his evidence. Such limitations as were placed upon time for argument and cross examination were within the sound discretion of the trial court and that discretion was not abused. This case does not present a denial of due process of law.

Donald complains here that he was allowed to call only two witnesses out of time and this was severely circumscribed in presenting his case. The facts, as contained in the record show that during Eula Del's case he actually called four witnesses during the first day of hearings, three at another hearing, and three more on the final day of evidentiary hearings. Further, when he was called as an adverse witness, on the third day of evidentiary hearings, his counsel had an opportunity, which he did not use, to cross examine his own client without any apparent time limitation.

It requires no citation of authority for the proposition that one cannot seek reversal based upon self induced error. The gist of Donald's arguments is that the court did not give him enough time and thus precluded him from getting certain alleged facts into evidence.

A fair reading of the record shows that Donald's time problems were self induced because of constant repetition. This was repeatedly pointed out by the Referee (see e.g. Vol. 6, pp. 44, 45, 48, 49, 72, 73 and 77). Indeed, despite his proper orders on the time for examination and cross examination for witnesses (Vol. 6, p. 39-41), the Referee frequently allowed counsel for Donald more time than those orders provided (see e.g. Vol. 6, p. 73, 74.)

Time which would otherwise have been available to Donald was also wasted by going into matters which had been covered by stipulation on the insurance proceeds for stolen items (e.g. Vol. 6, pp. 16-25), and on the value of the Columbine real property (Vol. 6, p. 198, 199) which had also been covered by stipulation (Vol. 5, p. 36, 37).

During the course of proceedings in the courts of Colorado, Donald's counsel at the trial level submitted an affidavit, which set forth the matters as to which Donald was not given the opportunity to testify. The record shows, however, that as to most of these at least, Donald did testify; for example, Donald did get in his version of the following items which it is now claimed he did not have time to cover;

a) As to property allegedly taken by Eula Del (Vol. 5, p. 25, 27-20).

b) As to his trade of previously owned non marital property for the mountain lots (Vol. 5, p. 36, 37 and 39).

c) As to the alleged gift to him alone of the Mercedes automobile by his father (Vol. 5, p. 40).

d) As to Eula Del's alleged expenditures of certain sums (Vol. 5, p. 42).

e) As to Eula Del's alleged damage to the marital home (Vol. 5, p. 44).

f) As to Eula Del's alleged failure to contribute towards expenses (Vol. 5, p. 45).

g) As to who made the payments on the Columbine lots (Vol. 5, p. 47 and 48).

Small wonder then that the Referee refused to allow more time to go over these same matters again.

The Court has proper control over such matters and they must be tested on an abuse of discretion doctrine. The rule is clear that:

"The right to introduce testimony on any cause is not without restriction as to nature and time. Testimony may, and should, properly be restricted to matters which are relevant and material, and not cumulative nor repetitions. . . ."

"Where the court orders testimony closed, it is the duty of counsel by offer of proof to point out to the court specifically the testimony desired to be introduced."

Johnston v. Johnstone, 123 Colo. 28, 32, 224 P.2d 949 (1950); see also: *Bond v. Local Union* 823, 521 F.2d 5, 11 (8th Cir. 1975).

Based upon this standard, it is clear that the Referee acted properly and that counsel for Donald simply did not. The offers of proof, or lack of them, in the record simply do support his present claims as to precluded testimony.

Donald complains here that he did not have an opportunity to present his side of the case and that there were many items he was not able to cover in his testimony. In so doing, he ignores the fact that almost all of the possibly relevant items as to which he has, or might, complain were already covered by him when he was called as a witness by Eula Del. His counsel, at that time, prior to the announcement by the Referee of any time restrictions, had the right to further examine him thereon but chose not to do so. This is but another example of the self inflicted wounds upon which he has predicated his petition.

The record shows that he did get his version in as to the critical items.

With regard to any limitations on time for cross examination of witnesses, this is a matter within the sound discretion of the trial court, and error must be tested by abuse of discretion standard (*United States v. Blitzstein*, 626

F.2d 774, 783 (10th Cir. 1980); *Government of the Virgin Islands v. Blyden*, 626 F.2d 310, 313 (3rd Cir. 1980).

The same rule applies with regard to limitation upon the time allotted for argument (*Biggs v. Mays*, 125 F.2d 693 (8th Cir. 1942)).

The rules announced by this Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971) do not require review of this case in the light of the fact that Donald was not precluded from presenting his version of the facts and having his witnesses heard. He has had a full measure of due process within the meaning of *Boddie*.

CONCLUSION

The factual posture of this case, based upon the proceedings at the trial court level demonstrate that there was no denial of due process. Nothing in this Petition justifies the expenditure of the limited time of this Court for consideration of the merits. This Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three true copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari were mailed, first class postage prepaid, and addressed to:

HUFFMAN REED WALKER ESQ
Barnett & Ross, Chartered
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this 23rd day of April 1984.



Irvin M. Kent